IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 340 of 2002

with

CRIMINAL REVISION APPLICATION No 383 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMARATBHAI SAKABHAI DESAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 340 of 2002
   MR PRAVIN GONDALIYA for Petitioner No. 1
   MR SS PATEL APP for Respondent No. 1
   MR KJ SHETHNA for Respondent No. 2-5
   RULE SERVED for Respondent No. 6-9
2. Criminal Revision Application No. 383 of 2002
   PUBLIC PROSECUTOR for Petitioner No. 1
   RULE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 17/10/2003

ORAL JUDGEMENT

Both these revision applications have been filed in order to challenge the order of the learned Principal Judge, City Sessions Court, Ahmedabad dated 02/08/02 transferring Sessions Case No.72/2001 (from Court No.10 to Court No.3) for hearing and disposal according to law.

2. The aforesaid sessions case is pending before the City & Sessions Court at Ahmedabad. Charge has already been framed and thereafter, the said sessions case was handed over to the learned Addl. Sessions Judge, Court No.10, City & Sessions Court, Ahmedabad for trial according to law. It seems that Mr.H N Jhala learned advocate appearing for the accused persons in the said sessions case and respondents in these two revision applications, submitted an application before the learned Principal Judge, City & Sessions Court, Ahmedabad on 09/07/02 stating that he (i.e. Mr.H N Jhala) was not keeping good health and is suffering from heart ailment. That Court No.10 has been functioning at the 2nd floor and he (i.e. Mr.H N Jhala) is not in a position to go to the 2nd floor for conducting the said sessions case. That, therefore, the said sessions case may be transferred to any other Court.

3. It seems that a similar application was submitted in the past on behalf of the accused in the Sessions Case No.184/98. The said application was not allowed and therefore, the accused therein, had preferred Cr.Misc.Appl.No.7844/2000 before this Court. This Court disposed of the said application by order dated 30/07/02 (Coram : Hon'ble Mr.Justice C.K.Buch).

4. In terms of the above order, the learned Principal Judge, City & Sessions Court, Ahmedabad was required to deal with the said the prayer for transfer of the said sessions case again. The learned Principal Judge after hearing the learned advocates for the parties passed an order, whereby Sessions Case No.72/2001 was transferred from Court No.10 to Court No.3 for hearing and disposal according to law. It may be noted that Cr.Misc.Appl.No.7844/2000 did not relate to Sessions Case No.72/2001.

5. Feeling aggrieved by the aforesaid order of transfer made by the learned Principal Judge, the

original complainant has preferred Criminal Revision Application 340/2002 whereas the State has preferred Criminal Rev.Application No.383/2002. Since, both the revision applications have been preferred against one and the same order, both of them have been tagged together. They have been heard together. They are, therefore, being disposed of by this common order.

6. So far the first revision application is concerned, the petitioner, original complainant, has stated that the learned Judge ought not to have transferred the said part heard case, when the charge has already been framed. It has also been contended by the petitioner, original complainant, that the order impugned in this revision application is illegal and perverse. That the learned Judge did not consider the objection raised on behalf of the State, opposing the transfer application filed by the learned advocate for the accused persons. That, though the witnesses were summoned for examination, they could not be examined, since adjournments were sought on behalf of the contesting respondents. It has further been contended that the aforesaid order of this Court, in the aforesaid Cr.Misc.Appl., has been misinterpreted by the learned Principal Judge. That the said matter related to another sessions case and therefore, it had no relevance on the facts of the case on hand. That, in fact, no ground for transfer was made out except the ground of health of the learned advocate appearing on behalf of the accused persons. That the learned Judge ought not to have passed an order for the transfer of the said sessions case on the ground of convenience of the advocate. That on the whole, the judgment and order of the trial court are illegal and perverse and deserve to be set aside.

7. So far, the revision of the State is concerned, it has been mainly contended that the learned Principal Judge has misinterpreted and misread the order of this Court referred to hereinabove and this Court never consented for the transfer of the said case from one Court to another. That, in fact, this Court simply directed the learned Judge to decide the said matter on merits which has not been done in accordance with the requirement of the directions of this Court. Therefore, the State has preferred this revision application, in order to challenge the said order of the learned Principal Judge, City Sessions Court, Ahmedabad.

8. On receipt of the two revision applications, Rule was issued in both the matters and in response to the service of notice of Rule, Mr.K J Shethna learned

advocate has appeared on behalf of the contesting respondents in Cr.Rev.Appl.No.340/2002. In Cr.Rev.Appl.No.383/2002, Mr.Adil Mehta learned advocate has appeared on behalf of the contesting respondents. Mr.S S Patel learned APP has appeared on behalf of the State. I have heard the learned advocates for the parties and have perused the papers. In fact, they have taken me through the application of the accused persons submitted in the aforesaid sessions case and also through the order passed by this Court in the matter referred to hereinabove.

9. The observations of the learned Principal Judge, City & Sessions Court, Ahmedabad may be reproduced for ready reference as follows;

Para 2 : "It is submitted by Mr.Jhala for the applicant that the Sessions Case No.72/2001 is transferred to the Add. City Sessions Court no.10 but the said case is not yet started and it is not a part heard case. No witness is examined by Court No.10. It is submitted by learned advocate Mr.Jhala that he is suffering from heart disease and he is not in a position to reach to the second floor. The court room of Court No.10 is situated on the 2nd floor. Mr.Jhala has stated that he has undergone by-pass surgery and is still under the treatment of cardiologist. He is advised not to climb stairs. Thus, he is not in a position to climb stairs and reach to the second floor. For the said reason, the said Session Case No.72/2001 be transferred to another Court. Mr.Jhala also submitted that for the said reason, Cr.Misc.Appl.No.7844/2000 is allowed by the Hon'ble High Court on 30/07/02. Xerox copy of the said order is also produced with the application at Ex.9. Mr.Jhala has stated that order was passed by Hon'ble High Court to transfer the said Sessions Case No.184/98 for the said reason.

Para 3 : On the other hand, it is submitted by learned APP Naynaben Bhatt that no order relating the present case is passed by the Hon'ble High Court. But Mr.Jhala has also submitted a xerox copy of oral order passed by Hon'ble High Court in Cr.Misc.Appl.No.7844/2000 on 30/07/02. The said xerox copy is produced with application Ex.9. It clearly shows that Mr.Jhala has submitted before Hon'ble High Court that he has undergone by-pass surgery and is still under

treatment of cardiologist and he is advised not to climb stairs. For the said reason and on the medical ground, a prayer is made by Mr.Jhala to transfer the said sessions case to another Court. The order clearly shows that prayer of Mr.Jhala was allowed by the Hon'ble High Court and there is also order to the Principal Judge, City Sessions Court to transfer the said sessions case to the another Court as early as possible. Hence reasons which are shown in this application are also accepted by the Hon'ble High Court. The prayer of Mr.Jhala for transferring the said case (Sessions Case No.184/98) is accepted by the Hon'ble High Court on the medical ground. In the present case also the same ground is shown be Mr.Jhala and it is prayed by him to transfer the case to another Court.

Para 4 : Mr.Jhala has produced medical case papers which shows that he was under treatment of Dr.K D Patel and Dr.Jyotindra Bhatt. Medical case papers of Dr.Bipin Shah and Dr.J L Bhatt cardiologist are also produced by Mr.Jhala. Mr.Jhala has also produced his test reports of Appollo Hospital, Gujrart Research and Medical Institution etc. it clearly shows that he is still under the treatment of cardiologist. The said facts are not denied by the learned APP that Mr.Jhala is aged about 69 years and he has undergone by-pass surgery. For the said reasons, the Hon'ble High Court has also agreed to transfer the sessions case of Mr.Jhala to another Court. I also agree that there is substance in the submissions of Mr.Jhala. Thus, this case is also transferred to another Court. Even though it is a part heard case, it was accepted by the Hon'ble High Court to transfer the Session Case No.184/98. While in the present case, no witness is examined by the prosecution. Hence there are more than one ground to transfer the said case from Court No.10 to another Court."

10. We can turn to the order of this Court referred in the said order of the learned City Sessions Judge in Cr.Misc.Appl.No.7844/2000. It is placed at page 9 in Cr.Rev.Appl.No.340/2002. It is required to be considered that the said application did not relate to sessions case No.72/2001, but, it related to Sessions Case No.184/1998. It is required to be considered that the learned Principal City Sessions Judge has also referred to the said order of this Court relating to Sessions Case

No.184/1998 and on relying upon the said order, the learned City Sessions Judge has passed the impugned order transferring the Sessions Case No.72/2001 from one Court to another. It would, therefore, be appropriate to reproduce the said order of this Court passed in Cr.Misc.Appl.No.7844/2000 for ready reference as follows;

"1. Heard ld. counsel Mr.Jhalal appearing for the petitioners. This application is filed to get the Sessions Case No.184/98 on the file of the ld. Addl. City Sessions Judge, Court No.13, City Civil & Sessions Court, Ahmedabad to any of the City Civil & Sessions Court, Ahmedabad having court room either on the ground floor or on the first floor, on the medical ground of ld. counsel appearing for the petitioners. Ld. counsel Mr.Jhala, however, has fairly stated that he would not press rest of the grounds raised in the application except the ground of his health. He has further submitted that he has undergone Bye-pass Surgery and is still under treatment of a Cardiologist. It is submitted that he has been advised not to climb stairs, if avoidable, on the medical ground he has made request to transfer the sessions case as aforesaid.

2. Ld. APP Mr.Kogje has rightly submitted that this request can be made before the ld. Principal Judge, City & Sessions Court, Ahmedabad on administrative side and he can take appropriate action.

3. Ld. counsel Mr.Jhala for the petitioners has submitted that he has requested ld. Principal Judge, City & Sessions Court, Ahmedabad to transfer the Sessions Case as aforesaid.

4. Under the circumstances, considering the nature of submissions and totality of the facts and circumstances of the case, it is ordered that ld. Principal Judge, City & Sessions Court, Ahmedabad shall take appropriate decision qua the request to transfer the Sessions case made by ld. counsel appearing for the petitioners as early as possible and preferably within ten days from today. In the meanwhile, interim relief granted by this Court shall continue. If is clarified that in the event of nonacceptance of the request made by ld. counsel appearing for the petitioners to transfer the sessions case, it

would be open for the petitioners to approach this Court afresh.

5. This application stands disposed of subject to aforesaid directions and observations."

11. On going through the above order of this Court dated 30/07/02, it clearly transpires that this Court has not taken any decision for the transfer of Sessions Case No.184/98 from one Court to another. There, this Court had entrusted the matter to the learned City Sessions Judge to decide the issue this way or that way. Even in para 4 of the said order referred to above, this Court has clearly directed the learned Principal City Sessions Judge to take appropriate decision qua the request to transfer the sessions case made by the learned counsel appearing for the accused persons as early as possible and preferably within 10 days from the date of the order.

12. In that view of the matter, it is very clear that this Court never directed the learned City Sessions Judge to transfer the said case from one Court to another. Even the above order of this Court did not consent for the said transfer from one Court to another. Therefore, neither there was any direction nor there was any consent for the transfer of the said sessions case from one Court to another. The learned Sessions Judge was required to decide independently, on the strength of the material placed before him. In other words, the learned Judge was required to decide the said issue on the merits of the case, without taking help of the aforesaid order of this Court dated 30/07/02.

13. The order of the learned Principal Judge has been reproduced hereinabove and it clearly appears from the said order that the learned Judge has taken it for granted that this Court had consented for the transfer of the said sessions case from one Court to another.

14. The learned City Sessions Judge has observed, during the course of his order referred to hereinabove, as follows;

14.1 "The order (of this Court dated 30/07/02) clearly shows that the prayer of Mr.Jhala was allowed by the Hon'ble High Court and there is also an order to the Principal Judge, City & Sessions Court to transfer the said sessions case to any other court as early as possible."

14.2 "The prayer of Mr.Jhala for transferring the said sessions case is accepted by the Hon'ble High Court on medical ground."

14.3 "For the said reasons, the Hon'ble High Court has also agreed to transfer the sessions case of Mr.Jhala to another Court."

14.4 "Even though it is a part heard case, it was accepted by the Hon'ble High Court to transfer the Sessions Case No.184/98, while in the present case no witness is examined by the prosecution."

15. Therefore, the learned City Sessions Judge has taken it for granted that this Court had directed him to transfer the said case or that, this Court had consented for the said transfer.

16. On a bare reading of the said order of this Court, it can be gathered that it is a matter of misreading on the part of the learned Judge and therefore, the order of the learned Judge cannot be treated to be legal and valid on that count. Mr.K J Shethna learned advocate for the contesting respondents does not dispute this position.

17. It is not much in dispute now that the Court No.10 in which the sessions case is pending at present is now being accommodated at the ground floor. In other words, Court No.10 is functioning at present at the ground floor and Mr.Jhala can very well appear before the said Court without any difficulty. This fact is an undisputed one.

18. This is a change in circumstances which is required to be considered by this Court. The learned advocates for the contesting respondents have contended that the impugned order was legal on the date on which it was passed. However, when subsequent events have changed the scenario, then those circumstances cannot be omitted from consideration.

19. Suppose a criminal case is sought to be transferred on some allegations against a particular Judge or a Magistrate and if during the pendency of application for transfer or during the pendency of revision against the said order, the Judge or the Magistrate concerned has been transferred and some another Judge or Magistrate takes over, then in that case, it may be said that looking to the change in

circumstances, the matter may be sent back to the Court concerned presided over by a different Officer. That would show that the change in circumstances is required to be considered for all purposes.

20. If once it is accepted that change in circumstances is required to be taken into account, then it becomes clear that Court No.10 has been functioning at the ground floor at present and therefore, Mr.Jhala, learned advocate for the accused persons can very well appear before that Court and attend the aforesaid sessions case without any difficulty. It is not the case of the contesting respondents that Mr.Jhala will find it difficult to attend the said Court functioning at the ground floor. Neither Mr.Jhala nor the accused persons in the said sessions case, has any difficulty in appearing before the learned Judge presiding over Court No.10. In view of the aforesaid change in circumstances, it is apparently clear that the cause for the transfer of the said sessions case does not survive at present. So, on the one hand, the learned City Sessions Judge has committed an error in treating the above order of this Court to be a direction or consent for the transfer of the sessions case concerned from one Court to another, and on the other hand, looking to the above said change in circumstances, it would not be necessary to transfer the said sessions case from one Court to another. Considering the said change in circumstances, it would be appropriate to allow both the revision applications and set aside the order impugned in these two revision applications.

21. Mr.K J Shethna learned advocate for the contesting respondents, has aruged that the State had consented to the transfer of the said sessions case and hence, the State can, now, not challenge the said transfer. A copy of the reply to the transfer application is at page 7 to this petition. In para 6 at page 8, the State has said that there is no reason for the transfer of the said sessions case. Then, in para 7, it has been said that the State does not insist on trial of the case before a particular Court. This can not be treated to be consent given by the State for the transfer of the said sessions case.

22. In that view of the matter, it would not be necessary for this Court to go into detailed discussion about other merits and demerits of the case, including the powers of the Sessions Judge u/s.408 and 409 of the said Code.

23. For the foregoing reasons, these two revision applications are allowed. The order dated 02/08/02 passed by the learned Principal Judge, City Sessions Court, Ahmedabad in Cr.Misc.Appl.No.2068/2002 is ordered to be set aside. The Sessions Case No.72/2001 will naturally be placed before Court No.10 functioning at the ground floor for hearing and disposal according to law.

(D. P. Buch, J.)

pravin/